



U.S. Department of Justice

*United States Attorney
Southern District of New York*

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December 19, 2016

By ECF

Honorable Valerie E. Caproni
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Larson v. United States of America*, 16 Civ. 245 (VEC)

Dear Judge Caproni:

This Office represents the United States of America (the “Government”), the defendant in the above-referenced tax refund lawsuit. At the oral argument on Friday, December 16, 2016, plaintiff’s counsel directed the Court’s attention to *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973), a case that was not cited in plaintiff’s opposition to the Government’s motion to dismiss. The Government writes briefly to discuss this additional case.

As an initial matter, *Irving* was not a tax refund lawsuit, but rather a request by taxpayers for injunctive relief that is inapposite here. In *Irving*, the Second Circuit, addressing a type of assessment entirely different from the 26 U.S.C. § 6707 penalty at issue here, involving the intersection of various Internal Revenue Code provisions also not at issue here, rejected the taxpayers’ argument that they were without judicial recourse to challenge IRS action in the face of an alleged “overpayment” of tax because they could have taken steps that would have enabled them to file a tax refund suit. 479 F.2d at 24. A footnote following this holding contained *dicta* regarding the *Flora* decision that did not squarely confront the issues raised in this lawsuit. *Id.* at 24 n.6.

Far more relevant than the Second Circuit’s *dicta* from 1973 regarding unrelated statutory provisions is the Federal Circuit’s decision last month in *Diversified Group Incorporated v. United States*, 841 F.3d 975 (Fed Cir. 2016), *petition for reh’g en banc pending*. After having been presented with substantially similar arguments regarding the applicability of the *Flora* full-payment rule, the Federal Circuit held that *Flora* applied to a multi-million-dollar penalty assessed under Section 6707. See *Diversified Grp. Inc.*, 841 F.3d at 985; see also Dkt. 2016-1014, No. 27, Appellants’ Reply Br. at 19-22 (discussing applicability of *Flora*). This Court should reach the same result.

We thank the Court for its consideration of this matter.

Respectfully submitted,

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